

No. 48865-5-II

Court of Appeals, Div. II,  
of the State of Washington

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**State of Washington,**

Respondent,

**v.**

**Pedro Godinez, Jr.,**

Appellant.

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Brief of Appellant

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## 1. Introduction

Pedro Godinez, Jr. was convicted of attempted first degree murder, first degree kidnapping, and unlawful possession of a firearm, and sentenced to 607.75 months imprisonment. On appeal, Godinez demonstrated that the trial court based this sentence on an offender score that was too high. On remand, the trial court re-imposed essentially the same total sentence, effectively ignoring the decision of this Court. The trial court also failed to provide any reasoning justifying the imposition of an exceptional sentence. This Court should reverse and remand for resentencing within the standard ranges.

## 2. Assignments of Error

### **Assignments of Error**

1. The trial court erred in imposing an exceptional sentence rather than a standard range sentence.
2. The trial court abused its discretion in imposing an excessive exceptional sentence.

### **Issues Pertaining to Assignments of Error**

1. When a court imposes an exceptional sentence, it must enter written findings of fact and conclusions of law demonstrating substantial and compelling reasons justifying the exceptional sentence. The trial court's written findings do not provide any reasoning to justify the exceptional sentence. Should this Court reverse for resentencing? (assignment of error #1)

2. A trial court has broad discretion in fashioning an exceptional sentence, but the sentence should be reversed if it is clearly excessive. The trial court, in effect, ignored the decision of this Court reducing Godinez's offender scores and imposed essentially the same sentence as it imposed prior to the first appeal, resulting in an excessive sentence. Did the trial court abuse its discretion? (assignment of error #2)

### 3. Statement of the Case

Pedro Godinez, Jr. was convicted of attempted first degree murder, first degree kidnapping, and unlawful possession of a firearm. CP 45. He was sentenced to a total of 607.75 months in prison: 429.75 months on the attempted murder charge, 111 months on the kidnapping charge, and 67 months on the firearm charge. CP 48. Each of these was within the standard ranges calculated by the trial court (337.5-429.75 for attempted murder, 111-128 for kidnapping, and 67-89 for UPF). *See* CP 47. However, as an exceptional sentence, the court ordered that the firearm charge would run consecutive to the other two charges (which were already consecutive to each other). CP 47.

Godinez appealed the conviction and sentence. CP 63. This Court affirmed the conviction but reversed the sentence, finding that the trial court had incorrectly calculated Godinez's offender scores. *State v. Godinez*, 191 Wn. App. 1043, 2015 WL 9036740 (2015).

On remand, the trial court corrected the offender score calculations, resulting in standard ranges of 313.5-397.5 months for attempted murder, 111-128 months for kidnapping, and 57-75 months for UPF. CP 163. The trial court imposed an exceptional sentence of 600 months: 397.5 months for murder, 128 months for kidnapping, and 74.5 months for UPF. CP 164.

The trial court entered written findings: “See attached findings of jury. Court determines to run Count 5 consecutively to Counts 1 and 2 as an exceptional sentence.” CP 174. The jury had found that Godinez “manifest[ed] deliberate cruelty to the victim” and “demonstrate[d] or display[ed] an egregious lack of remorse.” CP 175-76. The trial court observed in its oral ruling,

the facts of the case of course have not changed ...  
the prior criminal history has not changed ... the  
exceptional circumstances found by the jury have  
not changed. What has changed is the Community  
Supervision status—that there was one less point  
that counted towards the Offender’s Score which  
primarily affects Count One of the sentencing  
range. ... So I find no reason to depart significantly  
from the prior sentencing range.

RP 29-30. The trial court decided to impose a total sentence of 50 years (600 months) and then calculated how to reach that total within the standard ranges. RP 30-31. The trial court concluded, “So it is ... a few months difference in sentence but essentially the same sentence because I find that the factors

that led to that sentence are very much for the most part the same.” RP 31.

Godinez appeals from the new sentence. CP 182.

#### 4. Argument

A sentencing court may impose an exceptional sentence only if it finds, considering the purposes of the Sentencing Reform Act, “substantial and compelling reasons justifying an exceptional sentence.” RCW 9.94A.535. This Court may reverse an exceptional sentence if 1) the sentencing court’s reasons are not supported by the record, 2) the sentencing court’s reasons do not justify an exceptional sentence, or 3) the length of the sentence is clearly excessive. RCW 9.94A.585.

Here, the sentencing court’s reasons do not justify a departure from the standard range and the length of the sentence is clearly excessive.

##### 4.1 The trial court erred in imposing an exceptional sentence rather than a standard range sentence.

Assuming the aggravating factors found by the jury were supported by substantial evidence, those factors still do not, as a matter of law, create “substantial and compelling reasons” to justify an exceptional sentence in this case. First, the trial court’s findings and conclusions do not even attempt to justify the exceptional sentence, leaving this Court with an insufficient

record to review. Second, even if the record is sufficient, the aggravators are already accounted for in setting the standard ranges for murder and kidnapping.

**4.1.1 Whether an aggravating factor justifies an exceptional sentence is a matter of law reviewed de novo.**

This Court reviews de novo whether the reasons supplied by the sentencing court do not justify a departure from the standard range. *State v. France*, 176 Wn. App. 463, 469, 308 P.3d 812 (2013). When a trial court imposes an exceptional sentence, written findings of fact and conclusions of law are essential; the trial court's oral ruling will not suffice. *State v. Friedlund*, 182 Wn.2d 388, 393, 341 P.3d 280 (2015). The Court's review of the trial court's justification is a two-part analysis: first, the aggravating factor cannot have been an element of the crime; second, the aggravating factor must make the crime in question more egregious than other crimes of the same type. *State v. Russell*, 69 Wn. App. 237, 250, 848 P.2d 743 (1993).

**4.1.2 The exceptional sentence is not justified by the written findings of fact and conclusions of law.**

The trial court's written findings are insufficient. In order to impose an exceptional sentence, the court must find that there are "substantial and compelling reasons justifying an exceptional sentence." RCW 9.9A.535. The court must set forth



these reasons “in written findings of fact and conclusions of law.”

*Id.* The Washington Supreme Court has held that verbal reasoning, no matter how comprehensive, cannot substitute for this express statutory mandate. *Friedlund*, 182 Wn.2d at 394. The court noted that allowing sentencing courts to ignore the requirement of written findings would be contrary to the statutory purpose of making the criminal justice system accountable to the public. *Id.* at 395.

The trial court’s findings in this case do not provide any information to illuminate the court’s reasoning. The findings do not describe how the aggravating circumstances were “substantial and compelling” or how those aggravators justified an exceptional sentence. The trial court’s findings do nothing more than adopt the jury’s special verdicts for the aggravators and state what the exceptional sentence is. CP 174. The findings are entirely devoid of reasoning. They provide no information that is of any use to the parties, to this Court, or to the public. Allowing such useless findings to stand in this case would be no different from allowing the trial court to enter no written findings at all. Just as the court in *Friedlund*, this Court should reverse.

**4.1.3 The aggravating factors do not make Godinez's crime more egregious than other crimes of the same type.**

Murder and kidnapping are heinous crimes, but the manner in which Godinez committed the crimes was no more egregious than a typical case. In order to justify an exceptional sentence, an aggravating factor “must be sufficiently substantial and compelling to distinguish the crime in question from others in the same category.” *Russell*, 69 Wn. App. at 250.

Godinez met the victim, Landstrom, at an accomplice's apartment. *Godinez*, 191 Wn. App. 1043. At gunpoint, Godinez ordered Landstrom to put all his valuables on the bed. *Id.* Godinez then forced Landstrom to drive both men out of town, eventually stopping on a gravel road near a swamp. *Id.* Godinez ordered Landstrom to his knees, facing away from Godinez. *Id.* Landstrom stood and pled for his life. *Id.* Godinez ordered Landstrom back on his knees and shot him from close range. *Id.* The bullet grazed Landstrom's head. *Id.* As Landstrom stood and ran away, Godinez shot him three more times. *Id.* Landstrom survived, hid in the swamp, and eventually found help. *Id.*

The jury found that Godinez's conduct in committing the two crimes “manifest[ed] deliberate cruelty to the victim.” CP 175-76. “Deliberate cruelty is gratuitous violence or other conduct, significantly more serious or egregious than typical of the crime, which inflicts physical, psychological or emotional

pain as an end in itself.” *Russell*, 69 Wn. App. at 253. But nothing in the record demonstrates how Godinez’s cruelty substantially distinguishes his crime from other attempted murders or from other kidnappings.

It is not enough that the jury found deliberate cruelty; the trial court must additionally find that the aggravating factors were “substantial and compelling reasons justifying an exceptional sentence.” *See State v. Mann*, 157 Wn. App. 428, 441–42, 237 P.3d 966 (2010) (“while the jury must find the facts supporting an exceptional sentence, the court must determine whether the facts found were sufficient to warrant an exceptional sentence”). In this case, Godinez’s cruelty was no different from other crimes of the same type. As a matter of law, it does not justify an exceptional sentence.

The jury also found that Godinez “demonstrate[d] or display[ed] an egregious lack of remorse” for his crimes. CP 175-76. Lack of remorse must be of an aggravated or egregious character to constitute an aggravating factor; the mundane lack of remorse found in run-of-the-mill criminals is not enough. *State v. Wood*, 57 Wn. App. 792, 800, 790 P.2d 220 (1990). Refusing to admit guilt or remaining silent is an exercise of one’s rights, not an indication of lack of remorse. *Russell*, 69 Wn. App. at 251.

But, just as with the other factor, nothing in the record demonstrates how Godinez's lack of remorse makes his crimes more egregious than a typical attempted murder or kidnapping. Indeed, the description given in the previous appeal appears very run-of-the-mill.

Again, it is not enough that the jury found egregious lack of remorse; the trial court must additionally find that the aggravating factors were "substantial and compelling reasons justifying an exceptional sentence." In this case, Godinez's lack of remorse was no different than a run-of-the-mill criminal. As a matter of law, it does not justify an exceptional sentence. This Court should reverse the exceptional sentence and remand for sentencing within the standard range.

4.2 The trial court abused its discretion in imposing an excessive exceptional sentence.

**4.2.1 Whether an exceptional sentence is clearly excessive is reviewed for abuse of discretion.**

An exceptional sentence should be reversed if the sentence imposed was "clearly excessive." RCW 9.94A.585(4)(b). Whether a sentence is clearly too excessive is reviewed for an abuse of discretion. *Mann*, 157 Wn. App. at 441. A trial court abuses its discretion if its decision is based on manifestly unreasonable or untenable grounds. *Id.*

#### **4.2.2 The exceptional sentence was based on unreasonable or untenable grounds.**

The trial court, in effect, ignored the decision of this Court in the first appeal, re-imposing “essentially the same sentence” as it had imposed at the first sentencing under an erroneous offender score calculation. RP 31. The trial court set the original sentence at the top of the standard range for attempted murder (429.75 months) and at the bottom of the standard ranges for kidnapping (111 months) and UPF (67 months), for a total of 607.75 months. CP 47-48. After remand, the trial court reversed course and set all of the sentences at the top of the standard ranges (397.5 months for murder, 128 months for kidnapping, and 74.5 months for UPF), for a total of 600 months. CP 163-64. The trial court’s only reasoning for the change was its desire to arrive at a final sentence that was as close as possible to the original sentence—essentially flouting the decision of this Court.

The trial court itself observed that nothing had changed as a result of the appeal except for the correction of the offender score. RP 29-30. The reasonable reaction to that change would have been to apply the original, reasoned pattern to the corrected standard ranges: the top of the corrected range for attempted murder (397.5 months) and the bottom of the corrected ranges for kidnapping (111 months) and UPF

(57 months), for a total of 565.5 months.<sup>1</sup> *See* CP 163. Instead, the trial court decided to impose a total sentence as close as possible to the original sentence, and then calculated how to reach that total within the standard ranges. RP 30-31. There are no tenable grounds for this decision. The resulting sentence is clearly excessive. The trial court abused its discretion. This Court should reverse the exceptional sentence.

## 5. Conclusion

The trial court's reasoning does not justify an exceptional sentence, and the sentence imposed was excessive. This Court should reverse and remand for resentencing within the standard ranges.

Respectfully submitted this 10<sup>th</sup> day of October, 2016.

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<sup>1</sup> This assumes, only for the sake of argument, that the exceptional sentence was legally justified. If it was not legally justified, the UPF sentence would run concurrently with the other two, for a total sentence of 508.5 months.

## CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on October 10, 2016, I caused the foregoing document to be filed and served by the method indicated below, and addressed to each of the following:

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DATED this 10<sup>th</sup> day of October, 2016.

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## CUSHMAN LAW OFFICES PS

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